Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket 96-83
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF AUGUST 6, 1996 ORDER OF DIRECTV, INC.

DIRECTV, Inc.

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TABLE OF CONTENTS

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I. INTRODUCTION AND SUMMARY

For more than two years, the Commission has been working to amend its rules preempting local satellite antenna regulations, and has made significant strides toward overcoming the deficiencies in its old rule that allowed local governments to frustrate federal communications policy for nearly a decade. In order to complete this task and faithfully implement the Congressional objectives in Section 207 of the Telecommunications Act of 1996, the Commission must ensure that its final rule protects consumers from unreasonable regulations, burdensome procedures and costly fines. DIRECTV, Inc. urges the Commission to do so by amending its new preemption rule, 47 C.F.R. § 1.4000, to provide a clear definition to municipalities, homeowners associations and consumers of what is a "reasonable" antenna regulation and to establish a grace period for consumers to come into compliance with lawful local regulations once they have been notified of their noncompliance. The Commission also should reconsider its decision to allow

courts to provide initial review of disputes pursuant to Section 1.4000, and exercise its exclusive jurisdiction in this arena.

For ten years, the Commission had on its books a preemption rule, Section 25.104 of its rules, 47 C.F.R. § 25.104, that local governments all too frequently ignored. The rule, as adopted in 1986, failed to protect the federal interest in inexpensive and easy access to satellite communications for two reasons. First, the 1986 rule used a balancing test that was both unclear and allowed local officials to determine for themselves if a local regulation was "reasonable." The outcome of this balancing was not surprising: local governments enacted and enforced regulations that advanced local interests without regard to the burden placed on consumers' access to satellite antennas. Second, the 1986 rule established a burdensome exhaustion procedure that required consumers to pursue both local administrative and judicial remedies *before* approaching the Commission for relief. Given the time involved and expense of these procedures, consumers had little incentive to challenge unreasonable local regulations; even worse, they were not protected from enforcement of fines during these proceedings. Moreover, the road to exhaustion did not, in fact, lead to Commission review: the Second Circuit determined that once the courts had reviewed a local regulation, the Commission could not adjudicate the matter.[1]

The Commission recognized that its 1986 rule was a failure, and based on a substantial record that local governments were continuing to enforce unreasonable satellite antenna regulations, it amended Section 25.104 in February 1996. These amendments created a presumptive preemption of local regulations affecting smaller satellite antennas, including direct

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[1] *Town of Deerfield v. FCC*, 992 F.2d 420 (2d. Cir. 1992)

broadcast satellite ("DBS") dishes.[2] The amended Section 25.104 provided clear guidance to both municipalities and consumers that local regulations affecting DBS antennas could not be enforced unless and until the local government satisfied its burden of proving the regulation was reasonable. At the same time, the Commission recognized that Section 207, enacted shortly before it amended Section 25.104 in February 1996, required it to preempt local regulations, whether governmental or private, affecting antennas used for DBS as well as for other video programming services, including multichannel multipoint distribution service ("MMDS") and television broadcast service ("TVBS").

In order to provide some consistency in its preemption rules, the Commission consolidated the DBS antenna proceeding (handled by the International Bureau) with the MMDS and TVBS antenna proceeding (handled by the Cable Services Bureau), and in August 1996 it adopted the new Section 1.4000.[3] As drafted, Section 1.4000 prohibits all restrictions that "impair" reception -- in other words, regulations that "unreasonably" delay or add "unreasonable" costs to the installation of antennas, or interfere with reception. *See* Section 1.4000(a). Restrictions "necessary to accomplish a clearly defined safety objective . . . [or] necessary to preserve an historic district" are "exempted" from Section 1.4000(a), but must be applied in a manner that does not discriminate against antennas and that is no more burdensome than

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2 *Preemption of Local Zoning Regulation of Satellite Earth Stations,* 11 F.C.C. Rcd. 5809, 5820, ¶ 56 (Report & Order and Further NPRM) (March 11, 1996) (the *"March 1996 Order"*).

3 *See Preemption of Local Zoning Regulation of Satellite Earth Stations,* IB Docket 95-59, *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service,* CS Docket 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 96-328 (August 6, 1996) (the *"August 1996 Order"*).

necessary. *See* Section 1.4000(b). The Commission made clear that this exemption applies only to *bona fide* safety and historic preservation regulations, which will be scrutinized to ensure that they are indeed no more burdensome than necessary.[4]

Section 1.4000 abandons the presumptive preemption adopted in February 1996, and instead uses a "reasonableness" test to determine which regulations are prohibited. While the August 1996 Order articulates the Commission's preemption policy with some clarity, the rule itself is unclear in both substance and procedure. The reasonableness test, as written in the text of the rule, is full of ambiguities, leaving municipalities and homeowners associations without guidance as to which regulations will be found valid by the Commission. In addition, the rule is vague with regard to whether local restrictions may be enforced pending a review of their validity. One interpretation would allow a local government or homeowners association to enforce immediately any restriction that it finds to be "reasonable," returning the Commission to the very problems encountered under the 1986 rule. The Commission stated in the August 1996 Order, however, that only *bona fide* safety or historic preservation regulations could be enforced pending review.[5]

DIRECTV therefore suggests that the Commission revise its rule in several respects to provide more guidance to municipalities, homeowners associations and consumers. When considering these proposals, the Commission should keep in mind that DBS antenna users are consumers of a mass-market service who have invested as little as $200 in a dish; they are more likely call the local cable company than fight City Hall. The best way to protect consumers

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4 *Id.* at ¶ 25 ("In any proceeding challenging the validity of a particular regulation, we will look carefully at how safety restrictions are applied across the board.").

5 *Id.* at ¶ 53.

and promote the availability of alternative video programming providers is to provide local officials and homeowners associations with a rule that clearly defines the parameters of local antenna regulation, leading them to enact and enforce only those regulations that are truly reasonable. When consumers do face unreasonable regulations, however, they need to have available accessible and efficient review procedures, and should not be subjected to fines or enforcement pending the resolution of the review process.

First, in order to discourage the enactment of unreasonable local regulations and litigation over preemption, the Commission should define the word "reasonable" as it pertains to costs and delays imposed by local regulations. This guidance should be included either in the text of the rule itself or in notes appended to the end of the rule. Experience shows that neither local regulators nor consumers will be guided by (or even have access to) the Commission's orders and interpretations, but will look solely to the text of the rule itself.

Second, the Commission should set forth clearly in the text of its rule a new paragraph regarding the enforcement of local regulations. As the Commission has recognized, local officials should be able to enforce only *bona fide* safety or historic preservation regulations pending review. Consumers also should be given a grace period of 21 days to come into compliance with *any* local antenna regulation before being subjected to any fines.

Third, the Commission should guarantee to consumers that it will provide a low-cost, effective and efficient review procedure for local regulations. If consumers are required to go to court to defend their right to install antennas, they will opt for other technologies that are not similarly regulated by local governments or homeowners associations, such as cable television.

A consumer's choice from among available video programming services should be based upon competition between the providers, not upon the obstacles posed by local antenna restrictions.

II. THE COMMISSION SHOULD DEFINE WHAT IS REASONABLE LOCAL REGULATION

Rather than presumptively preempt all local restrictions that affect antennas, the Commission decided to repeat in its rule the statutory language of Section 207, and prohibit only those restrictions that "impair" the installation, maintenance or use of an antenna. As the Commission has recognized, "effective implementation of [Section 1.4000] hinges on the clarity of [the] definition of impair."[6] Accordingly, Section 1.4000(a) states that a restriction "impairs" the use of an antenna if it "(1) unreasonably delays or prevents installation, maintenance or use, (2) unreasonably increases the cost of installation, maintenance or use, or (3) precludes reception of a quality signal." Unfortunately, the Commission has failed to obviate the definitional problem presented by the 1986 rule, leaving consumers, municipalities and homeowners associations without a clear definition of what is "reasonable."

A clear and workable definition of "reasonable" is vital to the success of the new rule. Section 1.4000(a) allows a local government or homeowners association to enact and enforce only "reasonable" restrictions on antennas, subject to an "exemption" in Section 1.4000(b) for legitimate safety or historic preservation regulation. The text of the August 1996 Order makes clear the Commission's intent that this "reasonableness" standard is to be applied stringently, recognizing that Congress sought to eliminate the imposition of all delays and costs "that discourage consumers from choosing particular antenna-based services."[7]

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6 *Id.* at ¶ 17.

7 *Id.* at ¶ 18.

A. Regulatory Delay is Unreasonable

Regulatory delay, the Commission noted, "can, in practical terms, 'prevent' the viewer's access to video programming signals as surely as outright prohibitions."[8] Indeed, mass-marketed antenna-delivered services such as DIRECTV are successful competitors to cable television in part because they allow the consumer to purchase the system and install it on the same day, much like a VCR or other consumer electronic device. Delays caused by compliance with local governmental or homeowners association procedures, such as permitting or prior approval, are inconsistent with this model. The Commission's policy prohibiting these types of procedural requirements or other delay-causing restrictions comes through loud and clear in the August 1996 Order: "We believe that the imposition of delay is an impairment of the sort Congress sought to prohibit; accordingly, these types of procedural requirements and permits are prohibited."[9]

The text of Section 1.4000, however, does not convey this message. Local officials presented with the Commission's rule will read only that they may not enact or enforce restrictions that "unreasonably delay the installation, use or maintenance" of an antenna. Local officials will therefore be required to determine on their own how long a delay is "reasonable." In one local official's experience a delay of two weeks may seem reasonable, while another may believe that a three-month permitting process is perfectly acceptable. However, the market shows, and the Commission has determined, that *no delay is reasonable.*[10]

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8 *Id.* at ¶ 17.

9 *Id.* (noting that some delay may be acceptable if necessary to advance a narrowly-tailored and legitimate safety or historic preservation objective).

10 *Id.* (regulatory delay "can impede a service provider's ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements");

As experience under the 1986 rule showed, local officials will inevitably favor their own local interests over federal communications policy unless given clear direction from the Commission. The Commission therefore should state clearly either in the text of Section 1.4000(a), or in a note included at the end of the rule, that a regulation that requires the approval of any third party prior to the installation of an antenna is *per se* "unreasonable" and therefore is prohibited.[11] The rule should explicitly state that permits or any other form of prior approval may not be required for antenna installations.

B. Fees and More than *De Minimis* Aesthetic Requirements are Unreasonable

The Commission also has determined that requirements that result in additional costs "discourage consumers from choosing particular antenna-based services," and has prohibited such regulations if the costs are "unreasonable."[12] The August 1996 Order states that fees are *per se* unreasonable, as are aesthetic regulations that impose more than *de minimis* costs.[13] For example, while the Commission may allow low-cost aesthetic requirements such as painting a DBS dish to match a house if a similar requirement applies to similar appurtenances, it has made clear that landscaping and other expensive screening requirements will not be tolerated for these unobtrusive antennas.[14]

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see also March 1996 Order, 11 F.C.C. Rcd. at 5818, ¶ 41 ("it would not appear to be either reasonable or necessary to require a permit for a consumer-installed, 18-inch DBS antenna and thus a corresponding fee would also be unwarranted").

11 This change is reflected in proposed Section 1.4000, Note 1, attached as Exhibit A, marked to show changes from the rule as adopted. The proposed rule also includes some revisions suggested by DIRECTV in its Comments filed September 27, 1996, in response to the Further NPRM in these dockets.

12 *August 1996 Order* at ¶ 18.

13 *Id.*

14 *Id.* For some dishes, painting alone may impair reception. In addition, in some cases, painting may be expensive, and in those cases should be prohibited as unreasonable. For

Again, the rule itself fails to clearly articulate Commission policy. Local officials are therefore left with little guidance and a tremendous amount of discretion to determine what is a "reasonable" cost. A homeowner's association may feel that a regulation that imposes a $500 screening requirement is "reasonable" because the average house in the community is valued at $300,000. A local government may believe that a fee of $200 is "reasonable" because the viewer will pay more than $1,000 over the course of several years to subscribe to a video programming service. Each of these restrictions is patently unreasonable, and will lead consumers to choose antenna-less video programming services.

The Commission therefore should amend Section 1.4000 to make clear that local governments and homeowners associations may not charge fees for the right to install a satellite antenna, and may only impose an aesthetic requirement if the cost is *de minimis* and the requirement does not impair reception.[15] The Commission also should make clear in its rule, as it did in the August 1996 Order, that it will examine the treatment of similar objects in the community to determine if an aesthetic regulation is reasonable.[16]

III. SECTION 1.4000 NEEDS CLEAR PROCEDURAL GUIDELINES

Ensuring that consumers are free from unreasonable enforcement procedures and penalties is as important as establishing clear substantive standards for local regulators. Consumers will be dissuaded from selecting DBS services if threatened with immediate

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example, the coating on some antennas may not allow paint to adhere to the antenna, and therefore compliance with a painting requirement would require an expensive painting process.

15 *Id.* at ¶ 19 ("a requirement to paint an antenna *in a fashion that will not interfere with reception* so that it blends into the background against which it is mounted would likely be reasonable") (emphasis supplied).

16 *Id.*; *see also* Exhibit A (proposed Section 1.4000, Notes 2-3).

enforcement of antenna restrictions and the potential imposition of fines or other penalties if a challenge to the restriction is unsuccessful. The Commission must therefore establish clear and equitable procedures for enforcing local antenna restrictions. In all cases, consumers should be given a grace period to come into compliance with a restriction. Pending a proceeding to determine a regulation's validity, local authorities should be able to enforce the regulation only if it is related to legitimate safety and historic preservation objectives. Finally, no fines should be imposed until after a regulation has been determined to be valid under Section 1.4000, and the consumer has been given notice and a fair opportunity to comply.

A. Non-Safety or Historic Preservation Regulations Should Not Be Enforced Pending Review

First, the Commission must clarify whether a restriction may be enforced pending a determination of its validity. The August 1996 Order articulates the Commission's view that consumers should be able to install antennas without delay caused by local restrictions, and should be able to keep the antenna installed and operating pending a determination of whether a restriction is prohibited, unless the installation threatens legitimate safety or historic preservation objectives.[17] According to this policy, a regulation requiring a consumer to screen a DBS antenna with shrubs would not be enforceable pending a determination of its validity. A safety regulation prohibiting the installation of an antenna on a fire escape, on the other hand, could be enforced immediately, even if challenged by the antenna user.

The rule itself does not clearly implement this policy, leaving consumers vulnerable to immediate enforcement of *all* antenna restrictions. Section 1.4000(a) states that "[n]o civil, criminal, administrative or legal action of any kind shall be taken to enforce any restriction or

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[17] *Id.* at ¶ 53.

regulation prohibited by this rule" unless a waiver has been granted or a declaratory ruling has been obtained.[18] By including the word "prohibited" in this sentence, the logic becomes circular: a regulation prohibited by the FCC cannot be enforced until it is determined whether the regulation is prohibited by the FCC. The Commission cannot expect that the same local official taking the position in a proceeding that a restriction is consistent with Section 1.4000 will forego enforcement of that rule because it is prohibited by Section 1.4000. Section 1.4000 should therefore be amended to reflect the Commission's policy that the enforcement of all antenna restrictions, except those serving legitimate safety or historic preservation objectives, is prohibited pending review.[19]

B. Consumers Need Notice and a Grace Period Before Any Penalty is Imposed

Second, before any enforcement action is taken -- whether during the pendency of a review proceeding or after a determination that the restriction is consistent with Section 1.4000 -- consumers should be given written notice and a 21-day grace period to comply with a local antenna restriction. Moreover, if a regulation is adjudged valid under Section 1.4000, any fine or other liability imposed by the enforcing jurisdiction should not accrue until after the decision is rendered and the grace period has expired.

The grace period and forbearance from liability are essential to ensure that antenna-delivered services can compete on a level playing-field with cable television and other "antenna-less" services. Consumers will not feel entirely comfortable subscribing to DBS services if they fear immediate enforcement and liability -- whether civil or criminal -- for failure to comply with local antenna restrictions. Moreover, many consumers will not know whether an antenna is

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18 47 C.F.R. § 1.4000(a).

19 *See* Exhibit A (proposed Section 1.4000(g)).

subject to a local restriction, and, if so, whether that restriction is prohibited by the FCC's rule. Consumers should be able to purchase and install antennas without first researching local law and reviewing restrictive covenants; as the Commission has recognized, any delay in the installation of antennas acts as a disincentive for potential consumers, leading to choices made on the basis of local regulation, not service or other market-driven factors.[20]

As written, Section 1.4000 does not provide consumers with these essential protections. The rule prohibits the enforcement of restrictions during the pendency of certain proceedings, but does not provide any grace period for antenna users. And while Section 1.4000 prohibits the accrual of additional or cumulative fines "while a proceeding is pending to determine the validity of any restriction," it places no limit upon the initial penalty that may be imposed upon the consumer. Consequently, consumers may face enforcement and limitless penalties immediately upon a determination of validity.

The prohibition on the accrual of fines is not the effective remedy the Commission imagines it to be. A consumer is less likely to challenge a restriction he or she believes to be unreasonable if threatened with a fine if the decision goes the other way. In fact, the threat of a sanction gives the promulgating jurisdiction unfair leverage, allowing it to offer to suspend the fine if the antenna user drops the challenge. While the prohibition on the accrual of fines may reduce the threat to consumers, nothing in the rule limits the initial fine or prevents a jurisdiction from imposing criminal sanctions. The example in the August 1996 Order of a $50 penalty for noncompliance is itself unreasonable when a DBS antenna costs as little as $200. Moreover,

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20 *August 1996 Order* at ¶ 17.

there is nothing in the record to indicate that a $50 fine is representative of the penalties that would be imposed by local governments or homeowners associations.

Neither the 21-day grace period nor the forbearance from penalties will interfere with any legitimate local safety or historic preservation objectives; in fact, many local zoning ordinances already provide for grace periods prior to the commencement of code enforcement actions or the accrual of fines. The Commission's rule should allow a local jurisdiction immediately to enforce a legitimate safety or historic preservation regulation in accordance with its terms. For instance, if the fire code precludes the installation of an antenna on a fire escape, and provides for 5 days to come into compliance, then the municipality may enforce the restriction after 5 days, allowing the antenna user to relocate the dish.[21] The Commission should not, however, allow a municipality to impose a fine or other penalty upon an antenna user until the 21-day grace period has expired.

Nor will these protections provide the consumer with any unfair advantage. A consumer has no incentive to challenge a regulation that is reasonable or that already has been upheld merely to avoid compliance for the period of review plus the grace period. If a restriction has already been adjudged valid under Section 1.4000, the enforcing jurisdiction need only present the antenna user with the decision in writing and allow 21 days for compliance.

DIRECTV therefore proposes that the Commission add the following new paragraph (g) to Section 1.4000 to clarify its prohibition on enforcement of antenna restrictions, and to provide consumers with a grace period and a forbearance from fines:

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[21] If a restriction purportedly based on safety or historic preservation objectives is adjudged invalid under Section 1.4000, the consumer would then be free to re-install the antenna in its original location.

(g)(1) A governmental or nongovernmental authority may enforce any restriction hereunder based on a clearly defined safety objective or to preserve an historic district as defined in paragraph (b) during the pendency of any proceeding to determine the validity of such restriction, *provided, however,* that the governmental or non-governmental authority may not impose a fine or other penalty for 21 days following written notice to the viewer of an alleged violation of the restriction. If the viewer complies with the restriction within 21 days following such notice, no fine or penalty may be imposed.

(g)(2) A governmental or nongovernmental authority may not enforce any other restriction hereunder during the pendency of any proceeding to determine the validity of such restriction. If a ruling is issued (or, as the case may be, has been previously issued) that the restriction is not prohibited, the governmental or non-governmental authority may then enforce such restriction and impose a fine or other penalty *provided, however,* that the governmental or nongovernmental authority may not impose a fine or other penalty for 21 days following written notice to the viewer of the ruling. If the viewer complies with the restriction within 21 days following such notice, no fine or penalty may be imposed.

The final two sentences of Section 1.4000(a) would be deleted as redundant.[22]

IV. THE COMMISSION SHOULD ASSERT EXCLUSIVE JURISDICTION OVER DISPUTES PURSUANT TO RULE 1.4000

The Commission should reconsider its decision to allow litigants under Section 1.4000 to bypass Commission review in favor of judicial remedies. The Commission began this very proceeding because it had been precluded from interpreting and implementing its own regulation once a court had rendered an opinion in a zoning preemption dispute. Moreover, allowing local authorities to haul consumers into court will result in a decided disadvantage for the consumer. Courts simply cannot offer the expedited and inexpensive review procedures adopted by the Commission.

The Commission possesses the authority to establish exclusive jurisdiction over direct-to-home satellite services, including disputes pursuant to Section 1.4000. Section 303(v)

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22 *See* Exhibit A (proposed Section 1.4000).

of the Communications Act, as recently amended by Section 205 of the Telecommunications Act of 1996, provides that the Commission has "exclusive jurisdiction to regulate the provision of direct-to-home satellite services." While the Commission asserts that it retains discretion to exercise this jurisdiction in the August 1996 Order,[23] it has many prudential reasons to be the venue of initial review of disputes under Section 1.4000.[24]

First, exclusive jurisdiction is the only way the Commission can ensure that it will play a significant role in interpreting Section 1.4000. After the Second Circuit held in *Town of Deerfield, New York v. FCC*[25] that the Commission must review disputes *before* a court renders an opinion, the Commission proposed to amend its preemption rule and adopt new FCC review procedures in May 1995.[26] The Commission stated at that time that it "cannot ignore [its] responsibility to protect and promote the strong federal interest in widespread access to satellite communications."[27]

The Commission cannot fulfill this responsibility if it allows municipalities and other local authorities to enforce antenna restrictions in local courts and completely bypass the FCC review process. Municipalities regularly enforce their local laws in local courts, and the Commission cannot expect that they will change this practice without the imposition of exclusive FCC review. Nor can the Commission realistically expect that courts will "refer to [the FCC] for

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23 *See August 1996 Order* at ¶ 57.

24 Litigants would, of course, still retain the right to seek judicial review of a Commission decision. *See* 47 U.S.C. § 402.

25 992 F.2d at 428.

26 *Preemption of Local Zoning Regulation of Satellite Earth Stations,* 10 F.C.C. Rcd. 6982, 6983, ¶¶ 1-2 (NPRM) (May 15, 1995) (the *"May 1995 NPRM"*).

27 *Id.* at 6995, ¶ 42.

resolution questions that involve those matters that relate to [its] primary jurisdiction over the subject matter."[28] Nothing in Section 1.4000 provides courts with notice that the FCC expects such a referral, and not a single court referred matters to the Commission under the 1986 preemption rule.

Second, Commission review is the only way to guarantee that consumers are provided with a fair and equitable forum to hear their disputes. Today's antenna users have no economic incentive to engage in litigation before a court. The antenna users who have in the past sought judicial review of local antenna restrictions, including *Deerfield*'s Mr. Carino, had many thousands of dollars invested in satellite antennas and related equipment. In contrast, a DBS subscriber now spends $200 on the equipment and has a contract with the service provider for $30-$50 per month. If served with a complaint and a subpoena to appear in court, the DBS customer is more likely to call the cable company than an attorney.

The Commission has proposed a review procedure that is fair and efficient for all litigants.[29] Unlike court proceedings with complaints, discovery, depositions and required appearances, FCC review involves paper-only filings and short but reasonable pleading periods to encourage prompt resolution of disputes.[30] In addition, the Commission can provide all interested parties across the country with public notice of a dispute, a mechanism unavailable to a local court. In the end, consumers are far more likely to challenge enforcement of unreasonable local

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28 *August 1996 Order* at ¶ 58.

29 *March 1996 Order,* 11 F.C.C. Rcd. at 5818, ¶ 47.

30 *Id.; see also Procedures for Filing Petitions for Declaratory Relief of Local Zoning Regulations and for Waivers of Section 25.104,* Public Notice, Report No. SPB-41 (April 17, 1996).

restrictions under the Commission's user-friendly system. The Commission should assert exclusive jurisdiction to ensure that these procedures remain available.

V. CONCLUSION

The FCC has made great strides in its protection of consumers of antenna-delivered video programming services, including DBS; however, it has not yet finished its task. The Commission's rule should include concrete examples of restrictions the Commission will consider unreasonable and therefore prohibited. The Commission also should ensure that consumers are not subjected to immediate enforcement or penalties for installing DBS antennas. Instead, local authorities should be allowed to enforce a regulation only after providing notice and a grace period to the antenna user. Finally, the FCC should exercise its exclusive jurisdiction over disputes pursuant to Section 1.4000 in order to guarantee that consumers have a fair and efficient forum in which to challenge unreasonable local regulations.

Respectfully submitted,

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PROPOSED SECTION 1.4000

§ 1.4000 Restrictions impairing reception of Television Broadcast Signals, Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services

(a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners' association rule or similar restriction on property within the exclusive use or control of the antenna user ~~where the user has a direct or indirect ownership interest in the property~~, that impairs the installation, maintenance, or use of:

(1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; or

(2) an antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement; or

(3) an antenna that is designed to receive television broadcast signals,

is prohibited, to the extent it so impairs, subject to paragraph (b). For purposes of this rule, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it: (1) unreasonably delays or prevents installation, maintenance or use, (2) unreasonably increases the cost of installation, maintenance or use, or (3) precludes reception of an acceptable quality signal. ~~No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this rule except pursuant to paragraph (c) or (d). No fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction.~~

(b) Any restriction otherwise prohibited by paragraph (a) is permitted if:

(1) it is necessary to accomplish a clearly defined safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in

a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight and appearance to these antennas and to which local regulation would normally apply; or

(2) it is necessary to preserve an historic district listed or eligible for listing in the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470a, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance or use of other modern appurtenances, devices, fixtures that are comparable in size, weight, and appearance to these antennas; and

(3) it is no more burdensome to affected antenna users than is necessary to achieve the objectives described above.

(c) Local governments or associations may apply to the Commission for a waiver of this rule under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3. Waiver requests will be put into public notice. The Commission may grant a waiver upon a showing by the applicant or local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(d) The Commission retains exclusive jurisdiction over disputes pursuant to this rule. Parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2~~, or a court of competent jurisdiction,~~ to determine whether a particular restriction is permissible or prohibited under this rule. Petitions to the Commission will be put on public notice. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(e) In any Commission proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and does not impair the installation, maintenance or use of devices designed for over-the-air reception of video programming services shall be on the party that seeks to impose or maintain the restriction.

(f) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings

should be addressed to the Secretary, Federal Communications Commission, 1919 M Street,. N.W.; Washington, D.C. 20554. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

(g)(1) A governmental or nongovernmental authority may enforce any restriction hereunder based on a clearly defined safety objective or to preserve an historic district as defined in paragraph (b) during the pendency of any proceeding to determine the validity of such restriction, *provided, however,* that the governmental or non-governmental authority may not impose a fine or other penalty for 21 days following written notice to the viewer of an alleged violation of the restriction. If the viewer complies with the restriction within 21 days following such notice, no fine or penalty may be imposed.

(2) A governmental or nongovernmental authority may not enforce any other restriction hereunder during the pendency of any proceeding to determine the validity of such restriction. If a ruling is issued (or, as the case may be, has been previously issued) that the restriction is not prohibited, the governmental or non-governmental authority may then enforce such restriction and impose a fine or other penalty *provided, however,* that the governmental or nongovernmental authority may not impose a fine or other penalty for 21 days following written notice to the viewer of the ruling. If the viewer complies with the restriction within 21 days following such notice, no fine or penalty may be imposed.

NOTE 1: No restriction hereunder may require that the antenna user obtain a permit from or the approval of any governmental or nongovernmental entity prior to the installation of an antenna.
NOTE 2: No governmental or nongovernmental authority may collect a fee for the right to install or maintain an antenna.
NOTE 3: No restriction hereunder may increase the cost of the installation, maintenance or use of an antenna by more than a *de minimis* amount, except as provided in paragraph (b).